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No. 36

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

THE SUPERIOR OIL COMPANY
Petitioner

vs.

FEDERAL POWER COMMISSION,
UNITED GAS PIPE LINE COMPANY
Respondents

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

Vernon W. Woods
P. O. Box 1707
Shreveport, Louisiana
Attorney for Respondent,
United Gas Pipe Line Company

Of Counsel:

Wilbert O. Crain
Saunders Gregg
David Klotz
1525 Fairfield Avenue
Shreveport, Louisiana

Willis L. Meadows
Wilkinson, Lewis, Woods & Carmody
P. O. Box 1707
Shreveport, Louisiana

January 15, 1965

LECOMTE, SHREVEPORT, LOUISIANA

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No. 776

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Respondents

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BRIEF IN OPPOSITION

United Gas Pipe Line Company (United), having moved to be named a respondent in the captioned case, files, subject to said motion, its Brief in Opposition and prays that the petition for writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit entered August 14, 1964, be denied.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is reported as 335 F. 2d 1004 and is printed as Appendix "A" to the petition.

JURISDICTION

Jurisdictional requisites are correctly stated in the petition.

QUESTION PRESENTED

United wishes to confine its participation to the fourth question listed in the petition. Restated that question is as follows:

> Was there a sale of gas within the meaning of Section 1(b) of the Natural Gas Act, when, in obedience to the requirements of a contract covering the sale of gas to United for resale in interstate commerce, United paid for gas it is then unable to receive into its system, but which United has the right to receive at a later date?

STATUTE INVOLVED

The pertinent provisions of the Natural Gas Act, Section 1(b), 15 U.S.C. 717(b), is set out in Appendix "B" to the petition.

STATEMENT OF THE CASE

Petitioner, The Superior Oil Company (Superior), is a producer of natural gas; United is a transmission company engaged in the purchasing of natural gas which it transmits through pipelines and resells for ultimate public consumption. By contract Superior agreed to sell, and United agreed to buy for a period of twenty years and in the usual conduct of its business, gas produced by Superior from certain fields in South Louisiana. The contract provided that United would pay for, whether taken or not, a minimum quantity of gas in each contract year and that any deficiency in takings could be made up in a subsequent contract year after the required minimum had been taken.

Superior filed the contract with the Federal Power Commission (Commission) as an effective rate schedule, and it sought and obtained a certificate authorizing the sale. The Commission's order, issued August 10, 1959, granting the certificate without condition was vacated upon review and remanded.(1) In the interval between issuance of the certificate and the remand by the court service was initiated and United paid Superior for required annual minimum quantities of gas which quantities exceeded the volumes United was able to take into its system.

In its Opinion 398,(2) issued in the remanded proceeding, the Commission granted Superior a certificate

(1) *United Gas Improvement Co. v. Federal Power Commission*, 283 F. 2d 817 (9 Cir. 1960).

(2) 30 F.P.C. 283 (R. 549).

conditioned at an initial price lower than that contained in the contract and ordered Superior to refund the difference between the contract price paid and the lower price. This refund obligation extended both to gas paid for and delivered, and that paid for but not delivered.

In its application for rehearing Superior contended that payments made for gas not delivered were beyond the Commission's jurisdiction to regulate, asserting the gas so paid for had not been sold within the meaning of Section 1(b) of the Act

In its Opinion 398-A,[3] denying rehearing, the Commission rejected Superior's argument and ruled that, while, held for future delivery, the gas so paid for had been sold within the meaning of Section 1(b), and that the price paid was within its jurisdiction to regulate. The Fifth Circuit affirmed.

REASONS FOR DENYING THE WRIT

Sustaining Superior's argument would place outside the Commission's regulatory control a substantial amount of the price paid by United to Superior for gas bought under a conventional gas purchase contract and resold by United in interstate commerce. These payments were made in obedience to contractual provisions requiring United annually to pay for a minimum quantity of gas, but which also provided that the payments could be recouped in future years by accepting deliveries of gas in excess of the required, annual, minimum quantities.

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(3) 30 F.P.C. 682 (R. 606).

On the record made, the contractually provided make-up periods had not expired and Superior's contractual obligation to deliver the gas previously paid for remained extant.(4) Sustaining Superior's argument would reward its advantageous bargaining position by defeating the Commission's jurisdiction over the price currently paid for gas but held by Superior for future delivery.

Basically Superior's argument is that the Commission and the reviewing court misinterpreted the contract provisions. Superior says that, correctly interpreted, the contract provided that the payments made by United were "damages" for breach of contract and not payments for gas, and that payment of damages for breach of contract cannot be a sale of gas within Section 1(b) of the Act. But factually the contract contains no such provisions, and the Commission and the lower court declined to read such a legal effect into the clearly worded contract provisions. The most that can be said for Superior's argument is that Superior has sought to frame a mixed question of fact and law which, it says, was incorrectly decided below. Superior's plea for a different interpretation of the contract was rejected by both the Commission and the reviewing court, and it does not present a question of sufficient importance to warrant the intervention of this Court.

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(4) Since the record was made, the contractually provided make-up periods have been extended and much of the gas previously paid for has been delivered. Moreover, it is United's view that Superior may not be relieved of the duty to deliver gas so paid for without abandonment authorization granted under Section 7(b) of the Act.

Moreover, Superior's reliance on the contract terms presents Superior with a basic inconsistency in its argument. The contract on which it relies clearly binds Superior to deliver to United gas for these prepayments, after United has taken the required minimums in future years. Superior was unable to explain away this inconsistency in its arguments made below, and it omits any reference of this contractual obligation in the petition to this Court.

Contrary to Superior's contention, the holding is not in conflict with *Marr v. Federal Power Commission*, (Fifth Circuit 1964) 336 F. 2d 320. (5) There the Court held an assignment of oil and gas leases not to be within the Commission's jurisdiction. In *Marr* the parties resisted the Commission's effort to compel them to apply for a certificate authorizing the transaction. Differing from the situation in *Marr*, this proceeding involves issuance of the certificate of public convenience and necessity sought by Superior authorizing the transaction. Absent such a certificate the transaction could not be accomplished, Superior could deliver no gas under the contract, and it could demand no payments under the contract. This case involves the sale of gas by a producer to a pipeline under a conventional gas sales contract and is clearly distinguishable from *Marr* which involved an assignment of leases.

The holding affirmed below was that in annually paying for the contractually required minimum quantity of gas, United paid for gas, whether it was then delivered

(5) *Marr* and the instant case were decided by the same panel in opinions issued eleven days apart.

or held by Superior for future delivery; and that Superior sold the gas so paid for, including the portion held for future delivery, within the meaning of Section 1(b) of the Act. This holding comes within the accepted definitions of sales and nothing contained in the Act suggests that the sales included in Section 1(b) are restricted to those instances where the gas is physically delivered simultaneously with the act of payment. The holding is entirely consistent with the contractual agreement of the parties and defeats Superior's effort to carve out a gap in the Commission's jurisdiction, which gap could be seized on to defeat regulation over the price paid producers for very substantial quantities of gas purchased by pipelines in the normal course of their business for resale in interstate commerce. It defeats Superior's efforts to achieve a higher price for its gas than that which is just and reasonable, and it thus avoids an unfair burden on the consuming public. Finally, the holding permits the Commission to exercise its certificate authority over the flow of all gas sold in interstate commerce for resale, and it permits the Commission to avoid any future claim by Superior that, because of expiration of the contractually provided make-up period, it can lawfully refuse to deliver gas previously paid for but held for future delivery.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that Superior's petition for writ of certiorari should

be denied insofar as it raises issues with respect to the Commission's jurisdiction to regulate the price paid for gas held for future delivery.

Respectfully submitted,

Vernon W. Woods

Vernon W. Woods
P. O. Box 1707
Shreveport, Louisiana

Of Counsel:

Wilbert O. Crain
Saunders Gregg
David Klotz
1525 Fairfield Avenue
Shreveport, Louisiana

Willis L. Meadows
Wilkinson, Lewis, Woods & Carmody
P. O. Box 1707
Shreveport, Louisiana

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